Written Testimony of
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Hearing on H.R. 3405
Strengthening the Ownership of
Private Property Act of 2005

Committee on Agriculture
U.S. House of Representatives

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Mr. Chairman, Ranking Member, and Members of the Committee:

Thank you very much for inviting me to testify on H.R. 3405, the Strengthening the Ownership of Private Property Act of 2005. This Committee should be commended for giving its attention to the matter of economic development takings.

As the Committee is aware, I prepared and filed, with the assistance of other lawyers at my firm, a brief amicus curiae in the United States Supreme Court, on behalf of the Property Rights Foundation of America, in the case of Kelo v. City of New London, 125 S. Ct. 2655 (2005). In that case, of course, the Supreme Court upheld an economic development taking.

In my testimony I will discuss the Kelo decision as it relates to the fundamental constitutional principle that government may not take the property of one private party in order to transfer that property to another private party for the latter's personal benefit. I will also offer some comments on the drafting of the bill.

I.

The Takings Clause of the Fifth Amendment to the United States Constitution permits the taking of private property for "public use" so long as just compensation is provided. 1/ In Kelo, the Supreme Court held that the exercise of the power of eminent domain by the City of New London, Connecticut, in furtherance of a plan of economic development, constituted a constitutionally-permissible taking for "public use."

The taking of property in Kelo implicates an important principle of takings jurisprudence. The Supreme Court and Justices thereof have always condemned the taking of property from one private party for the benefit of another private party. Case law describes the transfer of private property from person A to person B for B's private benefit as both unjust and unconstitutional. I call this the "no A to B" principle.

In Vanhorne's Lessee v. Dorrance, 2 U.S. 304 (C.C.D. Pa. 1795), Justice Paterson declared unconstitutional a Pennsylvania statute that attempted to resolve a dispute over the ownership of land by vesting settlers from Connecticut with title and providing compensation to the competing Pennsylvania claimants. In so doing, Justice Paterson (who had been a member of the

1/ The Takings Clause is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. See Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

constitutional convention) specifically considered "whether the Legislature had authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation." Id. at 310.

While acknowledging that "the despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government," Justice Paterson opined that it is "difficult to form a case in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen." Id. at 310-311. See also id. at 318 ("When the Legislature * * * attempt[s] to take the property of one man, which he fairly acquired, and the general law of the land protects, in order to give it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation * * *.").

Three years after Vanhorne's Lessee, Justice Chase wrote in his now-famous opinion in Calder v. Bull, 3 U.S. 386 (1798), that "[i]t is against all reason and justice, for a people to entrust a Legislature with" the power to enact "a law that takes property from A. and gives it to B," and therefore the legislature cannot be presumed to have such a power. Id. at 388 (opinion of Chase, J.) (emphasis in original).

Three decades after Justice Chase's discussion of the "no A to B" principle, Justice Story was able to declare in Wilkinson v. Leland, 27 U.S. 627 (1829), that

> We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. [Id. at 658.]

See also Citizen's Sav. & Loan Ass'n v. Topeka, 87 U.S. 655, 663 (1874) (no court "would hesitate to declare void a statute * * * which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."); Olcott v. The Supervisors, 83 U.S. 678, 694 (1872) ("The right of eminent domain nowhere justifies taking property for a private use."); Wilson v. New, 243 U.S. 332, 370 (1917) (Day, J., dissenting) (calling "the taking of the property of A and giving it to B by legislative fiat" as "that method which has always been deemed to be the plainest illustration of arbitrary action").

In Missouri Pacific Railway Co. v. State of Nebraska, 164 U.S. 403 (1896), the Supreme Court held that a state court order requiring a railroad corporation to permit petitioners, an association of farmers, to build a storage elevator upon the railroad's property adjacent to its track "was, in essence and

effect, a taking of private property of the railroad corporation for the private use of the petitioners." Id. at 417. The Court explained that "[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." Id.

Similarly, in another case, a state railway commission order directing a railroad to construct an underground pass so that cattle belonging to the owner of adjacent land could pass under the railroad's tracks was held by the Supreme Court to "deprive plaintiff of property for the private use and benefit of defendant." Chicago, St. P., M. & O. Ry Co. v. Holmberg, 282 U.S. 162, 167 (1930).

The Supreme Court has reaffirmed the "no A to B" principle in its more recent cases. In Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984), the Court stated that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." See also Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55, 80 (1937) ("[T]his Court has many times warned that one person's private property may not be taken for the benefit of another private

person without a justifying public purpose, even though compensation be paid.").

The majority opinion in Kelo did not repudiate the "no A to B" principle, although it did not find the principle applicable on the facts on that case. 2/ The Kelo Court observed that "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." 125 S. Ct. at 2661. And the Court stated that "the City [of New London] would no doubt be forbidden from taking [the property owner's] land for the purpose of conferring a private benefit on a particular private party." Id. (emphasis added). The operative word in the Court's statement is "particular." The Court went on to say in a footnote that

> while the City intends to transfer certain of the parcels to a private developer in a long-term lease -- which developer, in turn, is expected to lease the office space and so forth to other private tenants -- the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown. [Id. at 2661 n.6.]

2/ In a dissenting opinion, Justice O'Connor described the prohibition against purely private takings as "a bedrock principle without which our public use jurisprudence would collapse." Kelo, 125 S. Ct. at 2674 (O'Connor, J., dissenting).

Thus, the Court in Kelo seemed to say the government's transfer of property from one private party to another does not run afoul of the "no A to B" principle so long as the government does not know beforehand the identity of the particular party, B, to which A's property will be transferred. 3/

The Kelo majority concluded that it would be difficult to accuse the government of taking the property of A for B's private benefit. Yet it is also difficult to deny that what the City of New London is doing comes uncomfortably close to violating the "no A to B" principle. Cf. County of Wayne v. Hathcock, 684 N.W.2d 765, 796 (Mich. 2004) (Weaver, J., concurring in part and dissenting in part) (concluding on facts similar to the facts of Kelo that "[t]his case is indeed a very straightforward example of government taking one person's property for the sole benefit of another.").

The City's plan involves taking private property from its current owners -- property that no one contends is blighted, economically unproductive, or being put to a harmful or inappropriate use -- and giving that property to a for-profit private developer essentially free of charge. And as the Kelo Court observed, "this is not a case in which the City is

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3/ The Court also said that "a one to one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case." Kelo, 125 S. Ct. at 2667.

planning to open the condemned land -- and least not in its entirety -- to use by the general public." Id. at 2662. "Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers." Id. Furthermore, no direct, immediate, and certain public benefit will be realized by the City's plan. Instead, the City's plan is based on a forecast or prediction that developing the property will produce economic benefits that will trickle down to the public at large over the long term. Finally, whether any public benefit will materialize under the City's plan is ultimately dependent upon the actions of a private party, not the government.

Kelo was a case decided by the barest of margins. In Justice O'Connor's dissenting opinion, which three of her colleagues joined, she declared that "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded * * * in the process." Id. at 2671 (O'Connor, J., dissenting). She went on to say that "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." Id. at 2676.

II.

Having discussed both Kelo and the "no A to B" principle, I would like to offer a few comments on the drafting of H.R. 3405, comments that I hope may assist the Committee.

To begin with, the prohibition on federal assistance provided for in Section 2(a) of the bill is triggered when a "State" or "unit of local government" 4/ engages in an act described in Section 2(b). The Committee should be aware, however, that the eminent domain power is sometimes delegated to and exercised by non-governmental bodies. The condemnation proceedings at issue in Kelo were initiated by the New London Development Corporation ("NLDC"), a private nonprofit entity. The NLDC did so, however, in the name of the City. See Kelo, 125 S. Ct. at 2659-60.

I would also point out that federal assistance is prohibited under the bill only when "ownership" of property taken for an economic development purpose is transferred to a private individual or entity. Because the term "ownership" is not defined, it is not clear whether the bill would apply to transfers of property interests stopping short of fee title. In Kelo, for example, negotiations were underway to lease certain

4/ It should be noted that, although Section 2(a) uses the term "unit of general local government" (emphasis added), Section 3(1) defines the term "unit of local government."

parcels for 99 years to a private developer who would pay $1 per year in rent. See Kelo, 125 S. Ct. at 2660 n.4.

The Committee may also wish to clarify whether or not the bill's applicability to a taking for an "economic development purpose" encompasses a taking for the purpose of ameliorating blighted areas. In the case of Berman v. Parker, 348 U.S. 26 (1954), the Supreme Court upheld a redevelopment plan with respect to a blighted area of Washington, D.C.

Finally, the bill does not indicate whether it would apply to a taking that was for the purpose of economic development combined with other purposes. Cf. Kelo, 125 S. Ct. at 2665 (in response argument that the Court should adopt a rule that economic development is not a sufficient purpose for the use of eminent domain power, the majority termed "unpersuasive" the "suggestion that the City's plan will provide only purely economic benefits"). The Committee may wish to clarify whether the bill applies to a taking that is intended, in whole or in substantial part, to promote economic development.

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